Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

NOS. 76-1234 AND 76-1261

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
HARRIET S. SHAPIRO,
Assistant to the Solicitor General,
ROBERT E. KOPP,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	5
Argument	6
The Secretary of Housing and Urban Development lawfully determined not to establish an operating subsidy program	6
A. The Secretary has discretion not to implement the operating subsidy program	7
1. The statute on its face does not impose a duty to implement the programs	7
2. Congress' failure to provide sufficient contracting authority is inconsistent with a duty to implement the program	10
B. The Secretary's exercise of her discretion may not be judicially overridden	19
Conclusion	25
Appendix	26

CITATIONS

Cases:

Commonwealth of Pennsylvania v. *Lynn*, 501 F. 2d 848	8, 9, 10, 11, 22
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	20
Marbury v. *Madison*, 1 Cranch 137	20
National Broadcasting Co. v. *United States*, 319 U.S. 190	20
Train v. *City of New York*, 420 U.S. 35	10
Underwood v. *Hills*, 414 F. Supp. 526, appeal pending, C.A.D.C., Nos. 76-1603 and 76-1650	14, 17, 18
United States ex rel. Redfield v. *Windom*, 137 U.S. 636	20

Statutes and regulation: Page

Housing Act of 1949, Section 2, 63 Stat. 413, as amended, 42 U.S.C. 1441 ..... 9-10, 29-30
Housing and Community Development Act of 1974. Section 212, 88 Stat. 672 6
National Housing Act, Section 236, as added, 82 Stat. 498, and amended, 12 U.S.C. (and Supp. V) 1715z-1 ..... *passim*
12 U.S.C. 1715z-1(a) 3, 6, 9, 26
12 U.S.C. 1715z-1(a)-1715z-1(c) 26-27
12 U.S.C. 1715z-1(e) 24
12 U.S.C. (Supp. V) 1715z-1(f)(1) 6, 24
12 U.S.C. (Supp. V) 1715z-1(f)(2) 3, 6, 8
12 U.S.C. (Supp. V) 1715z-1(f)(3) 2, 3, 5, 7, 8, 9, 15, 27
12 U.S.C. 1715z-1(g) 28
12 U.S.C. (Supp. V) 1715z-1(g) 9, 13
Pub. L. 93-414, 88 Stat. 1096 21
Pub. L. 94-378, 90 Stat. 1095, 1096 ..... 17, 18, 19, 30-31
86 Stat. 540 10
12 U.S.C. 1701s 14
12 U.S.C. 1749 *et seq.* 14
42 U.S.C. (Supp. V) 1437c 14
42 U.S.C. (Supp. V) 1437f 23
24 C.F.R. Part 886 23

Miscellaneous:

Budget of United States Government for Fiscal 1976 (January 1975) 12
Budget of United States Government for Fiscal 1977 (January 1976) 12
H.R. 6655, 95th Cong., 1st Sess. (1977) 13
H.R. Conf. Rep. No. 93-1310, 93d Cong., 2d Sess. (1974) 21
H.R. Conf. Rep. No. 94-1362, 94th Cong., 2d Sess. (1976) 18
H.R. Rep. No. 93-1139, 93d Cong., 2d Sess. (1974) 22
H.R. Rep. No. 94-313, 94th Cong., 1st Sess. (1975) 21
H.R. Rep. No. 95-236, 95th Cong., 1st Sess. (1977) 13

Miscellaneous—Continued

Page

Hearings on H.R. 8070 (Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1976) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Part 1 (1975) ---------- 20-21

Hearings on H.R. 14233 (Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1977) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 2d Sess., Part 4 (1976) ---------- 11

Hearings on HUD-Space-Science-Veterans Appropriations for 1975 before a Subcommittee of the House Committee on Appropriations, 93d Cong., 2d Sess., Part 6 (1974) ---------- 11

S. Rep. No. 93-693, 93d Cong., 2d Sess. (1974) ----- 8

S. Rep. No. 93-1056, 93d Cong., 2d Sess. (1974) ---- 22

S. Rep. No. 93-1255, 93d Cong., 2d Sess. (1974) ---- 21

S. Rep. No. 94-326, 94th Cong., 1st Sess. (1975) ---- 21

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76–1234

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

No. 76–1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in No. 76–1234 (*Ross* Pet. App. 1a-3a) [1] is not reported; the opinion of the district court upon entering a preliminary injunction in that case is reported at 396 F. Supp. 278 (*Ross* Pet. App. 6a–26a), and its opinion rendered in

---

[1] "*Ross* Pet." refers to the petition in No. 76-1234; "*Abrams* Pet." refers to the petition in No. 76-1261.

connection with entry of a final judgment is reported at 405 F. Supp. 831 (*Ross* Pet. App. 27a–37a).

The opinion of the court of appeals in No. 76–1261 (*Abrams* Pet. App. 1a-22a) is reported at 547 F. 2d 1062. The opinion of the district court in that case (*Abrams* Pet. App. 24a-29a) is reported at 415 F. Supp. 550.

JURISDICTION

The judgment of the court of appeals in No. 76–1234 (*Ross* Pet. App. 4a-5a) was entered on October 6, 1976. By orders dated December 29, 1976, and January 26, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 3, 1977, and March 5, 1977, respectively. The petition was filed on March 4, 1977.

The judgment of the court of appeals in No. 76–1261 (*Abrams* Pet. App. 23a) was entered on December 1, 1976. On February 22, 1977, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to March 31, 1977. The petition was filed on March 11, 1977.

The petitions were granted and the cases consolidated on May 23, 1977 (App. 178-179). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z–1(f)(3) requires the Secretary of Housing and Urban Development to establish and implement an operating subsidy program.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief (App., *infra*, pp. 26-31).

STATEMENT

Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (and Supp. V) 1715z–1, authorizes the establishment of three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z–1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(3)) programs. The issue in this case is whether the statute requires the Secretary of Housing and Urban Development to implement the operating subsidy program.

The respondents in these cases are the tenants of two housing projects that qualify for assistance under Section 236—the Uplands Apartments in Baltimore, Maryland (No. 76–1234), and the Meyler Park Apartments in San Pedro, California (No. 76–1261). In these suits against the Secretary, other federal defendants, and the private owners and managers of the respective housing projects, respondents contend that the Secretary is required to establish and implement an operating subsidy program for the projects.

In No. 76–1234, the district court on May 16, 1975, certified a class comprised of all tenants at Uplands Apartments who would be benefited by payment of the subsidy and granted a preliminary injunction requiring the Secretary to make subsidy payments to the project (*Ross* Pet. App. 11a, 25a-26a). On December 31, 1975, the district court granted a permanent injunction (*id.* at 37a). In its two opinions, the district court reasoned that the Secretary could have made operating subsidy payments without affecting her ability

to implement the other Section 236 programs and therefore was required by the statute to make such payments (*Ross* Pet. App. 19a–23a, 33a–37a). The court of appeals affirmed on the basis of the district court's opinion (*Ross* Pet. App. 1a-3a).

The district court in No. 76–1261 entered a similar injunction against the Secretary, but with the added requirement that payments to the Meyler Park project be made retroactively to February 18, 1975 (*Abrams* Pet. App. 24a–29a). The court ruled that the operating subsidy program was mandatory, relying in large part upon the conclusion reached in *Ross* that operating subsidy payments could be made from resources not available to other Section 236 programs (*id.* at 26a–29a). The court of appeals affirmed on this ground (*id.* at 1a–22a). While acknowledging that the Secretary possesses some discretion in the allocation of scarce resources among competing programs (*id.* at 12a-14a), the court held that it was an abuse of discretion to decline to implement the operating subsidy program, which, in the court's view, would not affect resources available for the other Section 236 programs.[2]

[2] The court concluded that although the statute "appears to give the Secretary broad discretion as to the timing of payments[,] * * * Congress intended for the Secretary to aid *some* projects by February 18, 1975" (*Abrams* Pet. App. 19a). Recognizing that ordinarily it would be appropriate to remand to permit the Secretary to determine whether the aid to Meyler Park should have started on that date, the court instead chose to affirm the district court's decision in order to avoid further delay, in light of the Secretary's consistent refusal to pay operating subsidies except pursuant to court order (*id.* at 20a).

SUMMARY OF ARGUMENT

The courts below erred in requiring the Secretary to implement the operating subsidy program. The statute provides only that the Secretary "is authorized to make" operating subsidy payments. 12 U.S.C (Supp. V) 1715z-1(f)(3). Moreover, Congress has limited her ability to implement the Section 236 programs by failing to release sufficient contract authority to support all three programs.[3] Since the deep subsidy program is mandatory, the Secretary necessarily had to choose between honoring commitments previously made under the interest reduction program and implementing the operating subsidy program. The existence of a small "reserve fund", consisting of certain payments made by project owners since 1968, does not change this conclusion. That fund supplements the funds appropriated for use in paying amounts due under authorized contracts; it is not an alternative source of authority to enter into contracts.

The Secretary's exercise of her discretion in allocating available housing resources is subject to review by the President and Congress, but not by the courts. In any event, her conclusion that the national housing needs would be better served by using the available contract authority to satisfy commitments made under the

---

[3] Programs under Section 236 are are funded by contract authority. Congress first specifies the total dollar amount of contracts that may be utilized by a given program. In subsequent appropriations acts, it releases specified amounts of that total contract authority, thus permitting the Secretary to enter into contracts up to the amount released. Finally, funds are appropriated as necessary to pay the amounts due under the authorized contracts.

interest subsidy program rather than by implementing the operating subsidy program was entirely reasonable.

ARGUMENT

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT LAWFULLY DETERMINED NOT TO ESTABLISH AN OPERATING SUBSIDY PROGRAM

Section 236 of the National Housing Act, 12 U.S.C. (and Supp. V) 1715z–1, is designed to encourage private enterprise to develop rental and cooperative housing for lower income families.

Originally, Section 236 provided only for an "interest reduction" program. 82 Stat. 498. Under that program, the Secretary may pay a portion of the interest on mortgages covering qualified low income housing projects, so as to reduce the rent paid by the tenants. 12 U.S.C. 1715z-1(a).[4]

Section 212 of the Housing and Community Development Act of 1974, 88 Stat. 672, added to Section 236 authorization for establishment of the "deep subsidy" and "operating subsidy" programs. The deep subsidy program permits very low income tenants to occupy units in a Section 236 project by defraying their rental expense to the extent that it exceeds twenty-five percent of their income. 12 U.S.C. (Supp. V) 1715z-1(f)(2).

---

[4] The tenant in a project covered by the interest reduction program pays a "basic rent"—*i.e.*, a reasonable rent assuming a mortgage bearing a one percent interest charge—or twenty-five percent of income, whichever is greater, but not more than fair rental value. 12 U.S.C. (Supp. V) 1715z-1(f)(1).

The operating subsidy program would provide payments to project owners to offset increases in utility charges and local property taxes, so as to obviate the necessity of raising the tenants' rent to cover these increased operating costs. 12 U.S.C. (Supp. V) 1715z–1(f)(3).[5] The subsidy would be available only on behalf of those tenants who pay more than twenty-five percent of their income for rent. *Ibid.*

The Secretary has not voluntarily implemented the operating subsidy program, for she has concluded that the limited resources available to her would more effectively further national housing objectives if expended for other programs she is authorized to establish and implement. The issue in this case is whether the Secretary's decision not to implement the operating subsidy program was consistent with Section 236.

A. THE SECRETARY HAS DISCRETION NOT TO IMPLEMENT THE OPERATING SUBSIDY PROGRAM

1. The statute on its face does not impose a duty to implement the programs

The statutory language establishing the operating subsidy program is permissive, not mandatory; the

[5] To determine eligibility for this subsidy, the Secretary first would determine the project's "initial operating expense level" (12 U.S.C. (Supp. V) 1715z-1(f)(3)), which consists of the cost of utilities and local property taxes payable by the project owner at the time the property achieved full occupancy, taking into account anticipated and customary vacancy rates. To the extent that costs of taxes and utilities exceed this initial expense level, the Secretary is authorized to pay a compensatory subsidy. No operating subsidy payment can be made unless the increased utility charges and property taxes are reasonable and comparable to increases affecting other rental property in the community.

Secretary is "authorized to make, and contract to make" operating subsidy payments. 12 U.S.C. (Supp. V) 1715z–1(f)(3). In contrast, the deep subsidy program is framed in unmistakably compulsory terms, providing that the Secretary "shall make, and contract to make" deep subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(2).[6]

The difference between these statutory formulations was recognized in *Commonwealth of Pennsylvania* v. *Lynn*, 501 F. 2d 848 (C.A.D.C.). There, the court sustained the authority of the Secretary to suspend the interest reduction program when she reasonably determined that its implementation interfered with other

---

[6] We see no basis for the court of appeals' speculation in No. 76-1261 (*Abrams* Pet. App. 11a-12a) that the difference between the permissive language relating to the operating subsidy program and the mandatory language relating to the deep subsidy program is attributable merely to the fact that the deep subsidy program applies only to new projects, while the operating subsidy program applies also to existing projects. If Congress had intended to require implementation of the operating subsidy program, it could have used precisely the same language—"shall make, and contract to make"—that it used with the deep subsidy program. Nor does the Senate Report on which that court relied (*id.* at 12a) support its conclusion that the Secretary's discretion is limited to deciding whether particular subsidies should be paid. Indeed, that Report emphasizes the distinction in statutory language upon which we rely. The Report refers to the deep subsidy program as a "provision [that] would require the Secretary to make additional payments," and as a "requirement" that could be modified only in certain circumstances; in contrast, the Report notes that the bill also provides that "the Secretary would be authorized" to make operating subsidy payments, but that such payments "could only be made" in certain circumstances. S. Rep. No. 93-693, 93d Cong., 2d Sess. 32 (1974).

housing goals. The court, noting that the statute establishing the interest reduction program was framed in nonmandatory terms, held that the decision whether to implement the program had been committed by Congress to the discretion of the Secretary. 501 F. 2d at 854.

As is also true with respect to the operating subsidy program at issue here, the statute merely authorizes the Secretary to institute an interest reduction program. 12 U.S.C. 1715z-1(a). Indeed, the statutory language relating to the interest reduction program is identical to that here—"the Secretary is authorized to make, and to contract to make * * *" (*ibid.*). Neither statutory provision contains any imperative phrase that would render either subsidy compulsory.[7]

In short, the statute does not impose a duty on the Secretary to implement the operating subsidy program; it merely empowers her to do so if she determines that such implementation would further the national housing objectives established by Congress.[8]

---

[7] The provisions that an initial operating expense level for each project "shall be established" (12 U.S.C. (Supp. V) 1715z-1(f)(3)) and that "the initial operating expense level for [existing projects] shall be established by the Secretary not later than [February 18, 1975]" (12 U.S.C. (Supp. V) 1715z-1(g)) do not make the program mandatory. Instead, read in context, they mean only that the Secretary was required to decide promptly whether to implement the program, at least for existing projects. If she had decided to implement the program, she would have had to follow the established statutory procedure for doing so. The calculation of the initial operating expense level is simply part of that required procedure.

[8] The Secretary's overriding responsibility, set forth in Section 2 of the Housing Act of 1949, 63 Stat. 413, is to achieve

2. Congress' failure to provide sufficient contracting authority is inconsistent with a duty to implement the program

a. The funding of programs under Section 236 is by contract authority. See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Pursuant to that procedure, Congress first specifies the total dollar amount of contract payments that may be made under Section 236, *i.e.*, the "authorized contract authority." By subsequent appropriation statutes, Congress "releases contract authority," *i.e.*, permits the Secretary to use specified amounts of that authorized contract authority for a given fiscal year or other prescribed period of time. From time to time thereafter, Congress appropriates "liquidation funds," *i.e.*, the funds necessary to satisfy contractual obligations entered into pursuant to the released contract authority. Congress last released contract authority for Section 236 in 1972 (86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million—an amount insufficient to fund all three Section 236 programs even for that one year. It was estimated that for that fiscal year, including the transitional quarter (July-September, 1976), the Secretary's commitments under the interest reduction program would require $74.8 million, the mandatory deep subsidy program

---

"the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." 42 U.S.C. 1441. It is essential to the effectuation of this statutory purpose that the Secretary be empowered "to choose between alternative methods of achieving the national housing objectives." *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 855.

would require $50 million, and the operating subsidy program, if implemented, would require $53.7 million.[9] Thus, after sufficient contract authority to fund the mandatory deep subsidy program was set aside, there was insufficient contract authority remaining both to honor existing commitments under the interest reduction program and to implement the operating subsidy program.[10]

Since Congress has not released sufficient contract authority for implementation of all three Section 236 programs, it cannot be understood to have required the Secretary to establish and implement each one. In particular, since Congress was aware of the Secretary's obligations under the interest reduction program [11] and presumably did not intend those obligations to be shirked, it cannot be understood to have required the Secretary to implement the operating subsidy program

---

[9] Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, p. 5, Apps. F and G.

[10] The Secretary decided to honor the existing commitments on interest reduction contracts, which had been made with developers of low income housing prior to the suspension of the interest reduction program in January 1973 and upon which those developers had relied. See pp. 20-24 and note 15, *infra*. See also *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 850.

[11] Hearings on HUD-Space-Science-Veterans Appropriations for 1975 before a Subcommittee of the House Committee on Appropriations, 93d Cong., 2d Sess., Part 6, p. 601 (1974) (statement of Mr. Tiernan). Hearings on H.R. 14233 (Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1977) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 2d Sess., Part 4, pp. 1176, 1177 (1976) (statement of Secretary Hills).

instead of satisfying those obligations. Moreover, the Secretary expressly advised Congress of her intention not to implement the operating subsidy program when she appeared before the Senate Committee on Appropriations on April 21 and 22, 1975 (App. 47).

It has been five years since Congress released additional contract authority for programs under Section 236.[12] Since that time, the existing released contract authority has been insufficient to fund all three Section 236 programs. The amount of released contract authority has steadily diminished over these years until, under current HUD budget estimates, all contract authority available for current Section 236 programs will be exhausted by the end of this fiscal year.[13]

This history suggests that Congress, through the power of the purse, has exercised its supervening authority to allocate scarce housing resources elsewhere, and to deny the Secretary the ability fully to exercise her own delegated authority to implement all three Section 236 programs. This choice by Congress is incon-

---

[12] Congress regularly has been apprised of the steady decline of available released contract authority through the annual budgets submitted to Congress by the President. See, *e.g.*, Budget of United States Government for Fiscal 1976 (January 1975); Budget of United States Government for Fiscal 1977 (January 1976).

[13] The Secretary informs us that the released contract authority available for Section 236 programs at the beginning of the current fiscal year was approximately $35.5 million, of which $17.5 million was required for the interest reduction program, $17.5 million for the deep subsidy program, and $.5 million for payments under the operating subsidy program pursuant to court orders. We are further informed that full implementation of the operating subsidy program for the fiscal year would have cost approximately $43 million.

sistent with respondents' claim that the Secretary lacks discretion and must implement the operating subsidy program. The history of congressional appropriations simply does not comport with a statutory scheme of mandatory character."

b. The courts below disagreed with this conclusion, in large part because they purported to identify an alternative source of funding for the operating subsidy program. They took the view that, unlike the other Section 236 programs, the operating subsidy program does not require contract authority for its implementation but instead may be funded directly out of the "reserve fund," a special fund consisting of payments from project owners to the Secretary of amounts collected in excess of "basic rental charges" (note 4, *supra*; 12 U.S.C. (Supp. V) 1715z-1(g)). See *Ross* Pet. App. 2a, 35a-36a; *Abrams* Pet. App. 14a-15a, 28a.

The reserve fund was created when the Congress first authorized the Secretary to establish the interest reduction program in 1968; it was then to be used only for interest reduction payments. 12 U.S.C. 1715z-1(g). The 1974 amendment to Section 236 requiring establishment of the deep subsidy program and authorizing establishment of the operating subsidy program provided that the reserve fund was to be available only to

---

[14] Congress now is considering amendments to the statute authorizing establishment of the operating subsidy program, in connection with the Housing and Community Development Act of 1977 (H.R. 6655). Each house has approved a different amendment that would make the modified program mandatory. Both amendments are now pending before a Conference Committee for resolution. See H.R. 6655, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 95-236, 95th Cong., 1st Sess. 21, 110 (1977).

make operating subsidy payments. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.[15]

The reserve fund cannot, however, be employed independently of contract authority; rather, the fund constitutes monies in the nature of liquidation funds to be used to fulfill contracts. The lack of available contract authority therefore cannot be cured by making payments for operating subsidies out of the reserve fund.

Since its enactment, Section 236, like many other federal housing programs, consistently has been administered through the use of contract authority.[16] Noth-

---

[15] Approximately $18 million of that sum represents overpayments by project owners. The district court in *Underwood* v. *Hills*, 414 F. Supp. 526 (D. D.C.), held that the Secretary could refund these overpayments to the project owners; the plaintiffs in *Underwood* are challenging that holding on appeal (C.A.D.C., Nos. 76-1603 and 76-1650).

The only payments made out of the fund since 1968 have been to satisfy operating subsidy contractual obligations entered into pursuant to court orders. In those cases, the reserve fund has been used as a source of liquidation funds supplementing appropriated funds. The payments made totaled approximately $650,000 as of May 31, 1977. The fund is currently growing at the rate of about $12 million a year. See Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, App. F.

[16] More than $3 billion in contract authority is obligated annually for various housing programs, including (1) payments to public housing agencies for the purchase of low income housing projects and payments to finance construction of low income housing (42 U.S.C. (Supp. V) 1437c); (2) payments to educational institutions (12 U.S.C. 1749 *et seq.*); (3) rent supplement payments, which assist low-income persons in meeting their rent (12 U.S.C. 1701s); and (4) the interest reduction and deep subsidy programs under Section 236.

ing suggests that Congress intended, by establishing the reserve fund, to create an exception to this established practice.

The court in No. 76-1261 concluded (*Abrams* Pet. App. 14a n. 11) that the statutory authority to "make and contract to make" operating subsidy payments (12 U.S.C. (Supp. V) 1715z-1(f)(3)) implied that Congress "contemplated payments not under contract." But the essence of the operating subsidy program is the Secretary's agreement to make payments to the project owners on behalf of qualified tenants; it is this agreement, which is contractual in nature, that makes it unnecessary for the project owner to raise those tenants' rents. The program thus necessarily contemplates that the Secretary will commit herself by contracting to make future payments.

Moreover, the reserve fund could not have been regarded by Congress as a separate means of conferring contract authority for implementation of the operating subsidy program, for the amount that will be available in the fund cannot be ascertained in advance. The very essence of contract authority is predictability: a large fixed amount of authority is granted in advance, so that the Secretary can measure her resources against the varied tasks and opportunities that she faces and plan her programs around those resources.

In contrast, the sufficiency of the reserve fund is essentially unpredictable: it cannot be known whether any excess rents at all will be collected in any given year, much less what the amount of such rents will be. A program that depended upon such indeterminate and fluctuating authority would be established upon a pre-

carious basis indeed. In the absence of any clear indication that it intended to do so, Congress cannot be assumed to have devised a new statutory mechanism, a "quasi-contract authority," that would have launched the program on such an uncertain course.

The reserve fund is a fund of money, not a fund of authority. Congress must have intended the reserve fund, in keeping with its character, to be a supplemental source of appropriated monies, not a supplemental source of contract authority.[17]

It follows that the monies in the fund are to be used in making payments under contracts previously en-

---

[17] It would not strengthen respondents' argument even if the reserve fund had been intended to act as a grant of additional contract authority. The monies in the reserve fund have never been sufficient to sustain a continuing operating subsidy program. Even after accumulating since 1968, the amount collected still is too small to permit implementation of the program for a significant time (see note 15, *supra*). Indeed, retroactive payments alone would entirely exhaust the fund. See the Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, pp. 10 n. 8, 12. This is further evidence that Congress could not have intended to require implementation of the operating subsidy program.

Respondents suggest (Br. in Opp. No. 76-1234, p. 7; Br. in Opp. No. 76-1261, pp. 4, 8-9) that since the reserve fund is sufficient to pay them the amounts to which they claim entitlement, the insufficiency of the reserve fund to support a national program is irrelevant. But respondents have suggested no reason why they should be preferred over other similarly situated tenants of other Section 236 projects, all of whom are represented in class suits currently before the courts (see *Ross* Pet. 6-7, nn. 7 and 9). Respondents should be entitled to payments only if the Secretary is required to establish a nationwide program. A comparison of the cost of establishing such a program with the funds available to do so is relevant to determining whether Congress intended such a requirement.

tered into by the Secretary. In other words, if the operating subsidy program were to be implemented, contract authority would have to be utilized to execute subsidy agreements, which the Secretary could liquidate by using appropriated funds together with whatever monies were contained in the reserve fund. The monies in the reserve fund therefore would reduce the amounts that the Congress would need to appropriate from the Treasury to meet outstanding contractual obligations.

Recent legislation confirms this view of the reserve fund's function. In a recent appropriation act, Pub. L. 94-378, 90 Stat. 1095, 1096, Congress eliminated the requirement that the fund be employed only for operating subsidies and made it available for a variety of other housing programs as well.[18] This statute makes plain that the reserve fund is a source of money, not of contract authority. It provides that the reserve fund, like appropriated sums, "shall be available * * * for the payments on contracts entered into pursuant to" authorized housing programs. Conversely, if the Secretary has not exercised her authority to enter into a contract, *i.e.*, has not utilized contract authority, she may not tap the reserve fund. Pub. L. 94-378 therefore demonstrates that Congress understands that the reserve fund is simply a substitute for appropriated funds and that

[18] Although all the monies now in the reserve fund have been earmarked by the Secretary for payments other than operating subsidies, the United States Court of Appeals for the District of Columbia Circuit, in *Underwood* v. *Hills*, *supra*, has enjoined the Secretary from making payments from the fund with respect to programs other than the operating subsidy program pending the outcome of that case.

neither may be utilized for the operating subsidy program or any other housing program in the absence of contract authority.[19]

In rejecting this analysis, the courts below relied upon the original statutory language establishing the fund, which had reserved the monies in the fund exclusively for use in the operating subsidy program. Thus, in No. 76-1261, the court concluded that the statement that the fund is "to be used" to make operating subsidy payments must be construed to mean that the reserve fund is not subject to contract authority limitations (*Abrams* Pet. App. 15a). But this language, which Pub. L. 94-378 in any event supersedes, did not dispense with contract authority; it simply limited the purpose for which the fund could be used and prevented its return to the Treasury or its commingling with appropriated funds for use in other housing programs.

---

[19] The court in No. 76-1261 (*Abrams* Pet. App. 22a) noted that the Conference Report on Pub. L. 94-378 (H.R. Conf. Rep. No. 94-1362, 94th Cong. 2d Sess. 5 (1976)) stated:

> The committee of conference is agreed that this action [making the reserve fund available for other housing programs] shall not prejudice any suit now or hereafter before the courts in this area.

This means no more than that the availability of the reserve fund for other Section 236 programs after October 1, 1976, does not affect the right of litigants such as respondents to be paid from the reserve fund if they prevail on the merits. That appears to be the basis for the court of appeals' orders in *Underwood* v. *Hills*, *supra* (see note 18, *supra*). But the congressional action in folding the reserve fund into the general housing payments account is nevertheless strong evidence of its understanding of the nature of the fund, both before and after October 1, 1976.

The dedication of the reserve fund for use in the operating subsidy program did not override the permissive, discretionary nature of the Secretary's authority to implement that program (see pp. 7-13, *supra*). Rather, the fund was "to be used" in the operating subsidy program once that program was implemented, *i.e.*, once the Secretary in her discretion chose to use her limited contract authority to incur obligations under that program. In short, the provision that the fund was "to be used" did not authorize the Secretary to make operating subsidy commitments in excess of her authorized contract authority any more than the similar provision in Pub. L. 94-378 that the reserve fund "shall be available" for other Section 236 programs indicates that contract authority need not be used in implementing those programs.

Accordingly, the courts below erred in holding that the exercise of contract authority was not a prerequisite to the expenditure of the reserve fund, and thus that the Secretary could have implemented the operating subsidy program without affecting the resources available for the other Section 236 programs.

B. THE SECRETARY'S EXERCISE OF HER DISCRETION MAY NOT BE JUDICIALLY OVERRIDDEN

The Secretary's discretionary determination not to implement the operating subsidy program involved the evaluation of national housing needs, and the prediction of the relative effectiveness of the alternatives available for meeting those needs. Moreover, that determination has a substantial impact on the Secretary's ability to implement other programs she is authorized to establish. The decision whether or not to exercise discretion to implement a major federal housing program thus is

not only peculiarly a matter within the Secretary's special competence, it lies at the very core of her responsibilities.

The ultimate control over housing policy is with the President and the Congress. If they disagree with the Secretary's estimate of national housing needs, they have remedies available. The President can replace her if he concludes she is not effectively furthering his housing policy. If Congress disagrees with her decisions, it can require her to act by making implementation mandatory. The courts have no similar responsibility for developing and implementing national housing policy. They therefore have no power to control or override the exercise of the Secretary's discretion on these fundamental policy issues; the determination whether one available housing program better serves national needs than another is simply not a judicial function. See *Marbury* v. *Madison*, 1 Cranch 137, 165-166; *United States ex rel. Redfield* v. *Windom*, 137 U.S. 636, 643-644; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224.

In any event, the Secretary's decision not to allocate resources to the operating subsidy program was reasonable and proper. Confronted with steadily dwindling contract authority, and lacking a clear statement from Congress as to its preference between the interest reduction and operating subsidy programs,[20] the

[20] Congress was advised of the Secretary's decision not to proceed with the operating subsidy program (see p. 12, *supra*). Although individual members of Congress expressed disapproval of this decision (*e.g.*, Hearings on H.R. 8070 (Department of Housing and Urban Development, and Certain Inde-

Secretary determined to utilize her remaining contract authority to honor commitments previously made under the interest reduction program rather than to dishonor those commitments in order to implement the operating subsidy program.

---

pendent Agencies Appropriations for Fiscal Year 1976) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Part 1, p. 665 (1975) (statement of Sen. Brooke)), these remarks evidently did not reflect a congressional concensus. Indeed, to the extent that such a concensus is discernible, Congress apparently favored greater emphasis upon the interest reduction component of Section 236 in preference to the operating subsidy program. In a 1974 appropriation act, Congress prohibited the Secretary from using appropriated funds for operating subsidies and limited the use of such funds to interest reduction payments instead. Pub. L. 93-414, 88 Stat. 1096. The accompanying Conference Committee Report expressly directed that contract authority not be used for operating subsidies in future projects. H.R. Conf. Rep. No. 93-1310, 93d Cong., 2d Sess. 6 (1974). The Senate Report on a supplemental appropriation act that year directed the Secretary to "take into account" the operating subsidy program. S. Rep. No. 93-1255, 93d Cong., 2d Sess. 8 (1974). Later appropriation acts, and accompanying legislative commentary, do not even refer to the operating subsidy program, but instead continue to express concern about the lack of sufficient low-income housing, a problem addressed by the interest reduction program, not by operating subsidies (see pp. 22-23, *infra*). See H.R. Rep. 94-313, 94th Cong., 1st Sess. 4 (1975); S. Rep. No. 94-326, 94th Cong., 1st Sess. 9 (1975). Finally, Congress ratified the Secretary's decision when it transferred monies in the reserve fund, formerly reserved for operating subsidies, to a general fund available for a variety of housing programs (see pp. 17-18, *supra*). This decision by Congress is indicative of Congress' disenchantment with the operating subsidy program as then authorized.

New legislation involving the program is currently under consideration (see note 14, *supra*). Those proposals, if enacted, would significantly modify the program as it now stands, and thus cannot be understood to reflect congressional re-enactment of the program the Secretary chose not to implement.

Before the interest reduction program was suspended in January 1973, the Secretary had represented to state and local public authorities and private developers that she would assist certain planned housing projects under that program; those entities had relied upon her representation in proceeding with the planning and construction of such projects (App. 33-35). See *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 850. The Secretary's failure to use her limited contract authority to carry out these existing commitments to state and local authorities and private developers "would [have] create[d] chaotic conditions" and defeated their substantial, and justified, reliance (App. 34).

In addition, the decision to honor existing interest reduction commitments would better serve the consistently expressed desire of Congress that Section 236 contract authority be utilized to increase housing production for low income families.[21] The interest reduction program, by reducing the effective cost of project mortgages, encourages the production of new housing for low income families, whereas the operating subsidy program, which does no more than absorb a portion of the increased utility charges and local property taxes that otherwise would be passed on to tenants in the

[21] H.R. Rep. No. 93-1139, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 93-1056, 93d Cong., 2d Sess. 6-8 (1974). See note 20, p. 21, *supra*.

form of higher rentals, does nothing to stimulate building.[22]

Moreover, the Secretary believed that the operating subsidy program would be excessively costly to administer, since it would require constant recalculations not only of the actual and reasonable increases in utility costs and local taxes for each project but also of the subsidy levels for each tenant; this administrative burden would be shared by the project owners.[23] It could

---

[22] The Secretary further determined that alternative programs would more effectively achieve the aims of the operating subsidy program (App. 47). For example, the "Section 8 set-aside program" (42 U.S.C. (Supp. V) 1437f; 24 C.F.R. Part 886) provides rent assistance that eliminates the need for operating subsidies. The families in projects receiving the benefit of Section 8 assistance pay no more than twenty-five percent of their adjusted income toward rent. Operating subsidies are payable only on behalf of tenants paying more than twenty-five percent of their income for rent. The Secretary advises us that Section 8 assistance currently is being provided to 111,448 housing units and that existing contracts for such assistance require obligation of $158 million in contract authority annually. That is independent of the contract authority available for Section 236 programs.

[23] There are approximately 4,000 projects receiving Section 236 assistance. To implement the program, the Secretary would have to calculate the initial operating expense level for each project; she would then establish the maximum monthly operating subsidy for each project. See note 7, *supra*. On the basis of that information, the project owners would calculate the actual operating subsidy applicable to each of the approximately 400,000 units involved, and determine each tenant's eligibility on the basis of a monthly review of all income data of that tenant. Each project owner would then submit billings to the Secretary reflecting the total subsidy payable to the project for that month. The Secretary would review these billings and return erroneous ones for recomputation. See the Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, App. G.

be anticipated, moreover, that any increase in a project owner's administrative costs would eventually be passed on to all his tenants, not just those receiving the subsidy, in the form of higher rents. See 12 U.S.C. (Supp. V) 1715z-1(f)(1) and 12 U.S.C. 1715z-1(e). Those increases could substantially offset any benefit tenants might otherwise experience from payment of the subsidy. These considerations additionally justify the Secretary's decision not to implement the operating subsidy program.[24]

This process would involve not only very substantial monthly operating costs, but also extremely large start up costs, in view of the need to train the staffs both of HUD and of the project owner and to make the initial calculations. If the Secretary must make retroactive payments, the difficulty of locating previous residents of affected projects and determining their eligibility on the basis of their monthly income since February 1975 will also add greatly to the cost of administering the program. Finally, if the Secretary must implement this program at approximately the same time she is also implementing the modified program required by the proposed amendments (see note 14, *supra*), the potential for confusion and the waste of housing funds are obvious.

[24] The court in No. 76-1234 (*Ross* Pet. App. 36a) suggested that the lack of sufficient funds fully to implement the operating subsidy program simply required the Secretary to implement a reduced program. In view of the very large administrative costs necessary for even partial implementation of the operating subsidy program, this would be a signally inefficient use of the limited funds available for housing programs. Moreover, there is no indication that Congress intended the Secretary to choose among otherwise similarly situated tenants faced with rent increases because of reasonable increases in taxes and utility rates, nor does the court of appeals suggest a neutral principle (other than a race to the courthouse) by which such a choice could be made.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

ROBERT E. KOPP,
ROBERT S. GREENSPAN,
Attorneys.

AUGUST 1977.

APPENDIX

12 U.S.C. 1715z-1 provides in pertinent part:

(a) *Authorization for periodic interest reduction payments on behalf of owner of rental housing projects.*

For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

(b) *Restrictions on payments; payments with respect to projects financed under State or local programs; mortgage insurance premium.*

Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided,* That the Secretary is authorized to continue making such interest reduction payments where the mortgage has been assigned to the Secretary: *Provided, further,* That interest reduction payments may be made with respect to a mortgage or part thereof on a rental or cooperative housing project owned by a private nonprofit corporation or other private nonprofit entity, a limited dividend corpo-

ration or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which may involve either new or existing construction and which is approved for receiving the benefits of this section. The term "mortgage insurance premium", when used in this section in relation to a project financed by a loan under a State or local program, means such fees and charges, approved by the Secretary, as are payable by the mortgagor to the State or local agency mortgagee to meet reserve requirements and administrative expenses of such agency.

(c) *Amounts of payments.*

The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

12 U.S.C. (Supp. V) 1715z-1(f)(3) provides:

For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at

the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

12 U.S.C. (Supp. V) 1715z-1(g) provides:

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund

to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

42 U.S.C. 1441 provides in pertinent part:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance ol slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities

and to the advancement of the growth, wealth, and security of the Nation. * * *

Pub. L. 94-378, 90 Stat. 1095, 1096, provides in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * *

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000; *Provided,* That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as

amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.